

Widuri (Migration) [2019] AATA 3688 (16 April 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Ni Ketut Intan Widuri

CASE NUMBER: 1714126

DIBP REFERENCE(S): BCC2016/399814

MEMBER: Helena Claringbold

DATE: 16 April 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(a) of Schedule 2 to the Regulations; and
- cl.820.221(1)(a) of Schedule 2 to the Regulations; and
- r.2.03A of the Regulations.

STATEMENT MADE ON 16 APRIL 2019 AT 7:50AM

1. **CATCHWORDS**

2. *MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Spouse) – genuine de facto relationship – de facto relationship for 12 months – genuine and continuing relationship – decision under review remitted*

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4. **LEGISLATION**

Migration Act 1958 (Cth), ss 5CB, 5F(2)(a)

Migration Regulations 1994 (Cth), Schedule 2 cls 820.211(2)(a), 820.221, rr 1.09A(3), 1.15A(3), 2.03A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. On 27 January 2016, Ms Ni Ketut Intan Widuri, the applicant, applied for a Partner (Temporary) (Class UK) visa. The application was based on her de facto relationship with Mr Chris Johansen, the sponsor.
6. On 30 June 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate was not satisfied that the applicant was the de facto partner of the sponsor. Therefore the applicant did not meet cl.820.211(2)(a) and cl.820.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) made under the *Migration Act 1958* (the Act). This is a review of the delegate's decision.
7. On 17 October 2018, the applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from Mr Johansen.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The Tribunal has taken into consideration all the evidence in the Department of Immigration and Border Protection's case file and the Tribunal's case file and the evidence at the Tribunal hearing.

10. ISSUE

11. The issue in this matter is whether, at the time of application, the applicant, was the de facto partner of the sponsor as defined in s.5CB of the Act and whether at the time of decision, the applicant, is the spouse of the sponsor.

12. BACKGROUND ON THE EVIDENCE

13. The applicant was born in 1977 in Amlapura, Karangasem, Indonesia. Her father is deceased. Her mother and four siblings live in Indonesia. On 19 December 2007, she divorced Mr Tulus Djoko Marijono. There is one child from this relationship, who lives in Indonesia.
14. The sponsor was born in 1963 in Australia. He is an Australian citizen by birth. His parents are deceased. He has one sibling living in Australia. He has been married on two previous occasions. His marriage with Ms Deborah Cull ended in 1998. His marriage with Ms Elizabeth Anne Johansen ended on 26 January 2014. There are two children from this relationship who live in Australia. He has another child living in Germany.
15. On 16 August 2013, the parties met. On 19 September 2014, the parties' de facto relationship began. On 24 March 2018, the parties married in Australia.

STATEMENT OF DECISION AND REASONS

16. CLAIMS AND FINDINGS

17. Is the applicant the spouse of an eligible resident?

18. The Tribunal is satisfied that the sponsor, at the time of visa application and at the time of decision, was and is an Australian citizen.

Whether the parties are in a spouse or de facto relationship

19. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, at the time of application, the applicant claims to have been the de facto partner of the sponsor. At the time of decision the parties were married. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Were the parties in a de facto relationship?

20. At the time of application, the parties were not married to each other under a marriage that is valid for the purposes of the Act, so they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
21. In forming an opinion whether the parties were in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3).

22. Are the parties in a spousal relationship?

23. The Tribunal has had regard to the parties' financial relationship; the nature of their household; the social aspects of the relationship; and the nature of their commitment to each other as set out in r.1.15A(3).
24. In relation to the parties' financial circumstances, the parties do not have any joint ownership of real estate or other major assets or any joint liabilities and do not owe any legal obligations in respect of each other. The sponsor supports the parties' financially. However, when the applicant worked she contributed to the parties' financial commitments. The sponsor is in the process of selling an investment property. He also inherited a 50 per cent share of his father's property and intends to buy out the other shareholder. The applicant has completed studies and is currently seeking employment and intends to contribute to the parties' financial matters. The Tribunal accepts that the parties pool their financial resources and share day-to-day household expenses.
25. In the parties' household, there is no evidence or claims that the parties have any joint responsibility for the care and support of children. The parties have lived together at three different addresses. The applicant is responsible for household chores and cooking and the sponsor is responsible for mowing the lawn and maintenance. The Tribunal accepts that the parties share the responsibility of housework.
26. Regarding the social aspect of the parties' relationship, the parties enjoy the company of friends. They dine out or have friends to their home. When the sponsor's parents were alive the parties visited them. The sponsor and the applicant travelled together on numerous occasions. He has met the applicant's family. The parties are recognised as being partners. Third party statements attest to the development of the parties' relationship and to the genuine nature of their relationship. Photographic evidence depicts the parties together and

with others at different locations. The Tribunal accepts that the parties plan and undertake social activities.

27. Concerning the parties' commitment, the parties were in a de facto relationship for more than three and a half years and have been spousal partners for approximately 13 months. The parties have lived together in a partner relationship for approximately four and a half years. During this time they provided each other with companionship and support. The parties helped the sponsor's mother by having her live in their home for the last weeks of her life. The sponsor has supported the applicant through her studies and they have both helped each other after the applicant's miscarriage. They envisage refurbishing the home the sponsor has inherited and either living there or renting the property. They are also trying to have a child together. The Tribunal accepts that the parties see their relationship as long-term.
28. The Tribunal considered the evidence individually and as a whole. The Tribunal is satisfied that both at the time of application and decision, the applicant and the sponsor had and have a mutual commitment to a shared life initially as de facto partners and then as husband and wife to the exclusion of all others; that their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis.
29. On the basis of the above, the Tribunal is satisfied that the requirements of s.5CB of the *Migration Act 1958* are met at the time the visa application was made and the requirements of s.5F of the *Migration Act 1958* are met at the time of this decision. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221(1)(a) of Schedule 2 to the Regulations.

Are the additional criteria for a de facto relationship met?

30. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
31. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
32. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so the applicant must meet the 12 month requirement. At the time of application the parties had been in a de facto relationship for approximately 16 months. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
33. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
34. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

35. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2)(a) of Schedule 2 to the Regulations; and
 - cl.820.221(1)(a) of Schedule 2 to the Regulations; and
 - r.2.03A of the Regulations.

Helena Claringbold
Member

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ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

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